No. 198.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

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BLANCHE K. TOWSON ET AL., APPELLANTS,

vs.

CHRISTIANA V. MOORE ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

William H. Campbell died May 21, 1881, having made his will March 16, 1878, in which, after certain legacies to his three children, all of whom were then living, and an annuity of five hundred dollars a year to his sister, Eloise Campbell, he devised and bequeathed all the rest and residue of his estate to his wife, Mary I. Campbell, in fee-simple, with remainder over to his three children, as tenants in common, should his wife predecease him. She survived her husband and took the estate. Two daughters, Christiana

and Julia, survived him. His son Leonidas predeceased him August 15, 1878, leaving his widow, Mary Kennedy Campbell, and seven children, three of whom are now married, daughters, and plaintiffs in the bill, viz., Blanche K. Towson, Edith G. Graham, and Nannie C. Towson. Three other children, John C. K. Campbell, Mary L. I. Campbell, and William H. Campbell (the latter appearing by his mother, Mary K. Campbell, as next friend), are also plaintiffs and appellants. A seventh child, Mary, who intermarried with Henry D. Fry, died, leaving two minor children, Gertrude and Edith, who are made parties to the bill as defendants.

Of the two daughters above named of William H. Campbell, Julia intermarried with Alexander W. Russell and Christiana with Frederick L. Moore. They and their husbands, with the minor defendants above named, are the defendants in this cause.

Mary I. Campbell, the widow of William H. Campbell, died August 6, 1893, aged 91 years, leaving a will, executed May 26, 1882, whereby, after some minor bequests, she left all the rest and residue of her estate to be equally divided between her two daughters, Julia and Christiana, above named, and the children of her son Leonidas. Frederick L. Moore and Alexander W. Russell, the husbands of her two daughters, Julia and Christiana, were named by her executors of her will, with full power to dispose of all the property, real and personal. They had also been, with Jordan W. Maury, the executors of the will of Wm. H. Campbell. The estate of Wm. H. Campbell has been duly administered and settled. Of the estate of Mary I. Campbell, the executors filed their first and final account on November 23, 1894, claiming to have disposed of and distributed the estate, except one piece of real estate, which remained unsold. On April 16, 1896, the complainants filed in the supreme court of the District of Columbia this bill in equity, setting out substantially the above facts; and, further, that for the pur-

pose of paying the above-mentioned annuity of five hundred dollars a year to Eloise Campbell, which had been left her by her brother, Wm. H. Campbell, the executors Russell and Moore had set apart $13,000 in U. S. registered bonds, at a then par value of $15,000, and kept them intact during the life of the annuitant. Eloise died October 1, 1885. The bonds thereupon became a part of the estate of Mr. Wm. H. Campbell's residuary legatee, viz., his widow, Mary I. Campbell. Accordingly, on October 5, 1885, they were transferred to her on the books of the Treasury Department, and on the next day—October 6, 1885—she made a gift of them in equal shares to her two daughters, Julia Russell and Christiana V. Moore. While the wills of Mr. and Mrs. Campbell have been alluded to, they are not contested; they are only brought into the case to throw light upon this gift, which the complainants allege by their bill was brought about through undue influence exercised over Mrs. Campbell by these two daughters and their husbands. The bill is framed with a double aspect—either to have this gift of Mrs. Campbell declared void on the ground of undue influence, or that it be regarded as an advancement to the two daughters and *pro tanto* as an ademption of the legacies bequeathed to them by the will of their mother, and the bill prays "that the real estate devised by the said Mary I. Campbell not yet sold may be ordered to be sold," and, secondly, that upon the final settlement of the accounts of the executors, Frederick L. Moore and Alexander W. Russell, the $13,000 of registered bonds may be accounted for at their market value and charged to the said Christiana V. Moore and Julia A. Russell.

To the bill the adult defendants answered, denying all the allegations of undue influence. The interests of the two infant defendants are, of course, identical with the interests of the complainants, and though they have not answered, their interests will be protected by the court.

Replication was filed and testimony taken, and, the case coming on for hearing, the bill was dismissed by the court

in special term, and afterwards this decree was affirmed by the Court of Appeals of the District of Columbia, and from that decree this appeal has been taken.

ASSIGNMENTS OF ERROR.

1. The court below erred in dismissing the bill.

2. The court below erred in not granting the prayer of the bill directing an accounting by the executors.

3. The court also erred in finding that no undue influence had been exerted by the defendants or any of them to procure the gift of said bonds.

THE FACTS AS DISCLOSED BY THE EVIDENCE.

William H. Campbell, the ancestor of the parties in interest, was an old resident of the District of Columbia. He was a devoted husband and father, and his wife, Mary I., joined with him in his desire to treat all of their children as equal participants in the property which he had accumulated during a long life of industry and economy. Accordingly, when, in 1868, he transferred to his son his business and stock in trade, he, at the same time, or nearly so, conveyed to his daughter Julia a house and lot in Washington city (see deed—Rec., 63) worth about $12,000, and to his daughter Christiana a farm of eighty-five acres in Montgomery county, Maryland (Rec., 66), of like value (Rec., 136), and, in order to more perfectly equalize these gifts to his three children, required his son Leonidas to pay to his daughters an amount sufficient to cover the estimated value of the business and stock in trade, which he did by executing notes of hand, which were afterwards paid (Rec., 139).

So, too, when he made his will (Rec., 9), March 16, 1878, we find him, in the very first item thereof, explaining that

his gift to his son Leonidas of household and kitchen furniture, books, etc., left in his E Street house, was made because of his "having provided during my [his] life for my [his] two daughters, Julia Anna C. Russell and Christiana V. Moore, by giving to each of them an *equal amount in value.*"

Then, as a premise to a gift of $5,000 each to his two daughters, we find the following language, showing that he had constantly in mind the equalization of all gifts to his children:

"Having provided for my son Leonidas Coyle Campbell by *establishing him in business* as my successor," &c., * * * "I *proceed* to give and bequeath to my daughter, Julia Anna C. Russell, the sum of five thousand dollars."

And then in the next item:

"I *also* give and bequeath to my daughter Christiana Virginia Moore a *like* amount of five thousand dollars."

He then gives his gold watch and chain to his grandson William, and to his sister, Eloise S. Campbell, an annuity for life of five hundred dollars per annum.

Lastly, to his wife, Mary I., he gives all the residue of his estate in fee-simple if she shall survive him, and if not, then to his said three children, Julia, Leonidas, and Christiana, "in *equal* shares to be apportioned *equally* between them." He provides also that if any one of these children should predecease him that the share of the one so dying should go to his or her children in *equal proportions.*

William H. Campbell died May 21, 1881, leaving a personal estate of $49,000 and considerable real estate. The will was read shortly afterwards at a family gathering (Rec., 26), and was pronounced by Frederick L. Moore and Mrs. Mary I. Campbell "a just will." The uncontradicted evidence on this point is given by Mrs. Mary K. Campbell, the widow of Leonidas, on page 46 of the Record, where she testifies as to a conversation held at that gathering with

Mr. Frederick L. Moore (one of the executors of the will and husband of Christiana, one of the daughters of William H. Campbell and beneficiary under the will) and Mrs. Mary I. Campbell, the widow. The conversation was as follows: He said to me, "Mary, Mr. Campbell's will is a just will." I said, "If it is carried out." He said, "It will be carried out to the very letter." "Mr. Campbell," he said, "was a just man and Mrs. Campbell was a just woman." They then went to Mrs. Mary I. Campbell, and Frederick L. Moore said to her, "Mollie says this is a just will." To which the widow replied, "I am very glad to hear you think it is just. Pa and I tried to do what is right."

With this "just" will fresh in her mind, in which her husband, *with her concurrence*, had endeavored to treat each of his three children *alike*, Mrs. Mary I. Campbell proceeds to make her own will just about a year afterwards. In this will (Rec., 12), after making certain small bequests to various charitable institutions, she gives the residue of her estate, being the property left her by her husband to her two daughters, Julia and Christiana, and the children of her son Leonidas, "*equally* to be divided between them" (Rec., 13), thus carrying out the original intention of her husband and herself that their three children should be *equal* participants in the estate of their parents—a provision which she, as we have seen, had stated to be "right" and "just." Nor is it denied, indeed it is averred by the defendants themselves, that it was always a paramount consideration with these parents that in the distribution of their property among their children or the descendants of those children there should be *equality*. (See the answers.)

At the time of making this will and for a long time afterwards Mrs. Campbell lived at the house of her son-in-law, Frederick L. Moore, husband of her daughter Christiana. He and his brother-in-law, Alex. W. Russell (who had married Julia), were the executors not only of her will, but of

the will of her late husband. He was, moreover, her business man and agent (Rec., 109).

On the death of William H. Campbell the executors of the estate set aside $13,000 in United States registered bonds for the purpose of paying the $500 annuity to Eloise. On the 1st of October, 1885, Eloise died, and this $13,000, under the terms of Mr. Campbell's will, reverted to his widow, who was then 83 years of age and poor in health. Had she died before Eloise or within a few days thereafter these bonds, with the rest of her estate, would have been divided *equally* between the two daughters *and the children of Leonidas.* But this is what happened: On October 5, just four days after the death of Eloise, Alexander Russell came over from Philadelphia, where he resided, and he and Moore caused these bonds to be transferred on the books of the United States Treasury to Mary I. Campbell. Nothing, however, was done *in the orphans' court*, and no record was made there to show a transfer of these bonds. *The very next day*, October 6, Mrs. Mary I. Campbell, who up to that moment had given every evidence of being as "just" as her husband in the *equal* division of his property among their children, transferred these bonds in equal portions to her two daughters, the wives of these two executors, one of whom was her confidential business agent (Rec., 109) and at whose house she lived. The children of Leonidas were thus cut out of any interest in this $13,000 of bonds, conceded to be worth at that time $15,000 in cash, although there was apparently the same kindly feeling towards them on the part of Mrs. Campbell as had existed at the date of making her will.

These facts, without further explanation, present a clear case of persons occupying a close *confidential* and *trust* relation towards a feeble old lady of 83 years profiting by obtaining from her gifts to each of their wives of $7,500—gifts wholly inconsistent with the lifelong attitude of herself and of her husband of treating equally with their own the children of their son Leonidas. As these bonds were

worth $15,000, it is plain that the children of Leonidas were thus cut out of $5,000, which would have come to them by her will had she died before making this gift to the wives of her two executors. She lived, however, eight years longer and died *without having ever told these grandchildren* that she had cut them out of this interest in the bonds. They discovered it only *after her death*, when the executors, who, with their wives, the beneficiaries, *had remained*, during all these years, *silent in regard to it*, disclosed the fact, as they were obliged to do, in their accounting to the orphans' court.

It is plain that under such circumstances, occupying as they and their wives did such a confidential relation towards this old lady of 83 years of age, they cannot be permitted to enjoy this gift at the expense of the children of Leonidas without fully satisfying the court by the clearest and most convincing evidence that the gift was made wholly without suggestion or influence exercised by them upon this old lady, causing her suddenly and secretly, and apparently without cause, to change the lifelong conduct of herself and husband to her grandchildren, who by her will had been made equal sharers with her two daughters in this property.

Adams Eq. (7 Am. ed'n), 184, says:

"And whenever any person stands in a relation of special confidence toward another, so as to acquire an habitual influence over him, he cannot accept from him a personal benefit without exposing himself to the risk in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained" (Note 1, referring to many cases in this country and in England).

In Boyd *vs.* De La Montagnie, 73 N. Y., 498, the court says:

"A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise influence over the conduct of another. * * * Where this relation exists,

the person obtaining *the benefit must show by the clearest evidence* that the gift was freely and deliberately made, and the transaction fair and proper. Story says, 'Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons would not be held objectionable'" (Story Eq. Jur., sec. 310).

Establishing, as we have done, this long confidential relation, the almost absolute control of this old lady by Moore and wife, the burden is shifted upon the beneficiaries to prove, without question, the fairness of the transaction throughout. Equity regards it upon its face with deep suspicion, and those who claim the benefit of it must explain it, so as to withdraw it from that suspicion.

In Couts *vs.* Ackworth (L. R.), 8 Equity, 558, the court says:

"The party taking a benefit under a voluntary settlement or gift, containing no power of revocation, *has thrown upon him the burden of proving that there was no deception or undue influence.*"

In Darlington's Appeal, 86 Pa. State Rep., the court uses this language:

"Constructive fraud often exists when the parties to the contract have a special, confidential or fiduciary relation, which affords the power and means to one to take undue advantage of, or exercise undue influence over the other. * * * A transaction between persons so situated is watched with extreme jealousy and solicitude, and if there be found the *slightest trace* of undue influence or unfair advantage, redress will be given to the injured party. Owing to the near connection between the parties in many relations the transaction in itself is considered so suspicious as to cast *the burden of proof* upon the person who seeks to support it. * * * The master says that there is no evidence that he (her husband) exerted undue influence over his wife to induce her to convey the land. * * * With-

out especially noting the influences of the master, it is enough that there is no *affirmative evidence* that it was the purpose of that woman free from her husband's undue influence to give him the land."

In Maryland the courts have frequently followed the above rule as to the burden of proof.

"It has been often said that this is a salutary doctrine, and the tendency of the more recent decision, no doubt, is to extend its application to all the varieties of relations in which dominion may be exercised by one person over another, and to every transaction whereby he who possesses the influence receives any pecuniary benefit from him who is subject to the influence. The cases in this State are to the effect that a gift obtained where a confidential relation exists, is *prima facie* void and the *burden is on the donee* to establish to the full satisfaction of the court that it was the free, voluntary and unbiased act of the donor."

Brooks *vs.* Berry, 2 Gill, 83.
Highberger *vs.* Stiffler, 21 Md., 338.
Grove *vs.* Todd, 33 Md., 188.
Pairo *vs.* Viskeny, 37 Md., 467.
Cherbonnier *vs.* Evitts, 56 Md., 276.

These cases and authorities show that the burden of proof is upon those who seek to retain a benefit from one occupying a confidential or trust relation, whenever the circumstances suggest the slightest degree of imposition.

But although the plaintiffs might well have rested in showing the foregoing facts, they took upon themselves the burden of showing by affirmative testimony that undue influence was exerted upon old Mrs. Campbell to secure this gift from her.

Mrs. Laura E. Baker, an old and intimate friend of Mrs. Campbell, says (Rec., 40, 41) that on one occasion, a few months before the death of Eloise, she, Mrs. B., visited Mrs. Campbell at the E Street house, where she was then living with her daughter, Mrs. Moore, and that Mrs. Campbell in the course of a conversation told her "that Mrs. Moore and

Mrs. Russell had made her promise that if she was to outlive Miss Eloise Campbell she would divide $12,000 between them equally, and that they worried her so that, to get rid of them, she promised them she would; that she was afraid of Mr. Moore. About a month or six weeks after the death of Eloise, Mrs. Campbell told her that she had divided the money between Mrs. Moore and Mrs Russell."

A strong, but, we submit, an unsuccessful effort was made to break down this testimony by a close and rigid cross-examination of Mrs. Baker. It is not very difficult for an astute and experienced lawyer to so cross examine an inexperienced old lady as to bring about apparently unimportant conflicts in the "corroborative details" of her testimony, especially after a long time has elapsed since the occurrence in regard to which she is testifying; but if the witness is truthful (and no attempt has been made to impeach the character of Mrs. Baker) the salient fact remains. Moreover, Mrs. Baker was corroborated by her daughter Eliza (Rec., 140), who testifies that shortly after the death of Eloise she accompanied her mother on a visit to Mrs. Campbell, and there heard the latter state to her mother that the reason why she had divided this money between Mrs. Moore and Mrs. Russell was "to prevent being worried." At that visit she says that Mrs. Campbell told her mother "to come close to her and to listen to what she had to say, and not to answer, for there was always some one listening at the door." "She told her she was going to Philadelphia to live with her other daughter; that Mr. Moore and Mrs. Moore treated her unkindly; that neither wanted her there, and that she was afraid of Mr. Moore, and she hoped she would be happier in Philadelphia;" * * * that the tears were rolling down the old lady's face while she was telling this; that when she and her mother went downstairs Mrs. Moore asked her, witness's, mother if she, Mrs. Campbell, "had been talking against the Moores; that if she had,

not to mind her, for she was in her *dotage*, and that she went around the neighborhood talking about them."

There is not the slightest ground for attacking the truthfulness of this witness, nor indeed that of her mother, but, of course, the exigencies of the defendants' position force them to assert its falsity, since otherwise they are compelled to concede the plaintiffs' case. In support, therefore, of the truthfulness of this testimony, the plaintiffs called another witness, Thomas Brooke (Rec., 146), who testified that at the time these visits of Mrs. Baker were made to Mrs. Campbell, Mrs. Baker was living about five miles from Washington, in Prince George county, Maryland, about a mile from Hyattsville; that he was residing with Mrs. Baker at that time; that he remembered the visits by Mrs. Baker to Mrs. Campbell in Georgetown, of her taking the train, &c., and of her return, and remembers the conversation had with her on her return, in which she stated that she had seen Mrs. Campbell, and how Mrs. Campbell had spoken of her being harassed by her two daughters to divide the money between them if she outlived Eloise, and he testifies to other matters coincident with this visit and strongly tending to corroborate Mrs. Baker's statement. So that in order to reject the testimony of Mrs. Baker we must necessarily find her not only untruthful, but also her daughter and Mr. Brooke, and yet not the slightest *motive* for their testifying falsely has been or can be suggested by the counsel for the defense.

But the defense seeks to avoid the force of Mr. Brooke's testimony by insisting upon its inadmissibility. This position, however, is untenable.

"Proof of declarations made by a witness out of court in corroboration of testimony given by him on the trial of a cause is, as a general and almost universal rule, inadmissible. To this rule however there seem to be exceptions and that under special circumstances such proof will be received as where the witness is charged with giving his testimony

under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at the time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation arising from a change of circumstances could have been foreseen (Robb *vs.* Hackley, 23 Wend., 50; *In re* Hesdra's Will, 119 N. Y., 618, reported in full in N. E., 555, and citations). In order to come within the above exceptions to the rule, it is not necessary, as contended by the appellant's counsel, that there be a direct charge of fabrication. It is sufficient if the impeaching evidence tends to show that the account of the transaction given by the witness is a recent fabrication or was prompted by corrupt motives (*In re* Hesdra's Will, *supra;* Herrick *vs.* Smith, 13 Hun., 446); or where the object of the cross-examination is to show that the testimony of the witness is an afterthought and a subsequent invention (Gilbert *vs.* Sage, 57 N. Y., 639, 640; Wray *vs.* Fredderke, 43 N. Y. Super. Ct. Rep., 335, 340; Com. *vs.* Wilson, 1 Gray, 337, 340). In the case before us it is apparent from a careful reading of the proceedings and evidence, that the object of the question put on the cross-examination of the hospital surgeon with respect to any statement made by George L. Baber when he was brought to the hospital, the cross-examination of the boy, and the defendant's direct examination of its witnesses, all had a tendency and were calculated to impeach the boy's testimony, and to stamp it as an afterthought and a fabrication of recent date; and under these circumstances, and with the authorities above cited, it was proper to show, in answer, that he had previously told the same story."

Baber *vs.* Broadway & S. A. R. Co., 43 N. Y. Suppl., 42.

The text of the foregoing exposition of the rule is fully sustained by—

1 Green. Ev., sec. 469.

1 Phil. Ev., 231.

1 Starkie Ev., 149.

French *vs.* Merrill, 6 N. H., 465.

Stoep *vs.* Blair, 68 Ill., 541.

And see especially the clear and forcible language of the court *In re Hesdra's Will* cited above and reported fully in 23 North Eastern Reporter, p. 555.

THE DEFENCE.

The plaintiffs, as we have seen, needed not the testimony of these three witnesses to establish their *prima facie* case. They did that when they showed the close and confidential relation of these two executors and their wives to this old lady "in her dotage," and the fact that inconsistently with her lifelong course of conduct she had made these wives the recipients of a large bounty at the expense of the children of her only son, who were shown to be, up to that moment, as much the objects of her and her husband's parental solicitude as were these two wives. The moment the plaintiffs presented to the court *prima facie* evidence of such a case, the burden of proof was, as we have seen, at once shifted upon the defendants to establish by clear and convincing evidence the absence of all pressure or undue influence upon old Mrs. Campbell. But the plaintiffs have presented to the court a much stronger case than the one we have just stated. They support it by proof that this most munificent gift of $15.000 in bonds, part of the *corpus* of the mother's estate, which by her will she had already bequeathed equally to the plaintiffs and defendants, was studiously *concealed* from the plaintiffs. Nowhere in the record does it appear, or is it alleged or contended by defendants' counsel that it appears, that the Moores or the Russells, or any one for them, ever communicated the fact to the widow of Leonidas or any of her children that their grandmother had divided these bonds between Julia and Christiana and left out her son's children, and yet at that time they were all apparently on the best of terms. Why was this information withheld, and why was such care taken to get from the old lady a paper to the effect that they had been given freely and without suggestion from

any one? Was it not because they felt that the circumstances connected with this gift required that it should be fortified by a paper evidently on its face written at the dictation or suggestion of some person acquainted in some degree with legal forms? And who could that be but her attorney and business man (Rec., 169), Frederick L. Moore, whose *wife* was one of the beneficiaries of this paper?

To these facts the defence has nothing more to offer than—

1. The allegation of laches.

2. A denial by those who of course must deny or abandon their case.

3. An attempt to pick flaws and show alleged contradictions in the testimony of Laura Baker in its minor and immaterial details.

4. The loving letters of a loving mother to her daughters as proof that she loved them enough to give them these bonds, forgetting that she wrote equally loving letters to the plaintiffs, who were ignored entirely in the matter, even to the fact of informing them of it.

5. The production of a paper alleged to have been written by Mrs. Campbell and professing to give the reason for making the gift.

We shall deal with these defences in their order.

ALLEGED LACHES.

This consists in the charge that the plaintiffs should have brought this action *before* the death of Mary I. Campbell. The only evidence relied upon as proof of the *knowledge* of the plaintiffs in regard to the disposition of these bonds is that Mrs. Laura Baker communicated to Mrs. Mary K. Camp-

bell, the widow of Leonidas, the substance of Mrs. Mary I. Campbell's conversation with her, Mrs. Baker; but this conversation did not relate to the *bonds* at all. The statement was that the two daughters had worried her into agreeing to give them $12,000 after the death of Eloise, and that after her death she had given that amount of money to them. Not a word was mentioned about these bonds, and Mrs. Mary K. Campbell might well have thought it to have been money accumulated by Mrs. Mary I. Campbell herself from the income of the estate of her late husband, and have supposed that it formed no part of the corpus. But it is important to observe that the defendants nowhere show that this knowledge of Mary K. Campbell was ever *communicated* to these plaintiffs, who are the real parties in interest. Mrs. Mary K. Campbell is not a party to the suit, except as committee of a *non compos* plaintiff, and is not one of the legatees. How, then, can the plaintiffs be charged with her knowledge of the facts, even if she had it, any more than they could be charged with Mrs. Baker's knowledge? But, even conceding that they had knowledge, yet parties can be charged with laches only from the *time* they have a *right of action* and no right of action accrued to these plaintiffs until the death of Mrs. Mary I. Campbell. The plaintiffs until her death had no interest in this fund *nemo est hæres viventis*. Had they filed their bill, therefore, in her lifetime a demurrer would have properly lain thereto. There has been no such delay since her death as forms any ground for the charge of laches. The executors had a year in which to settle the estate, and until then a bill could not have been maintained, even supposing the knowledge of these facts came to the plaintiffs during that time.

If the contention of the plaintiffs be well taken, it is plain that there was no necessity to allege in the bill any facts *excusing* laches, since there was no laches. The bill was filed within a reasonable time, considering the number of

the plaintiffs and the necessity of some little time for conference among them and concert of action.

The contention of the defendants that they have lost by *death* the testimony of Mrs. Mary I. Campbell can cut no figure in the case, since it was necessary that her death should occur before the bill could be filed. It is, to say the least, a rather curious contention that plaintiffs should have filed their bill before the *death* of a person in order that the defendants might have had the benefit of her testimony, when *until the death of that person* no cause of action arose. Besides this, the testimony of Mrs. Mary I. Campbell, even if it could be had, is of little importance. She was in her dotage and under the influence of the defendants, and that her testimony would have been colored by that influence there can be but little doubt. It should consequently have had but little weight with the court.

Even, therefore, could this bill have been filed during the lifetime of Mrs. Mary I. Campbell, the failure to do so has worked no injury to the defendants, for her testimony, as we have seen, in view of her great age and the influence she was under, would have entitled it to but little, if any, consideration. It is not contended that any *other* evidence has been lost. There is no *altered* position of the parties. The defendants have not been led to do anything or abstain from doing anything that has put them in a worse position by reason of any alleged delay on the part of the plaintiffs.

"If a party has a clear right in equity with no remedy at law, if it appears that no unconscionable result will follow relief, mere delay in bringing his action will not cause a court of equity to refuse it" (Spurlock *vs.* Sproule, 72 Mo., 503).

"Length of time *alone* is not evidence of staleness" (Paschell *vs.* Hinderer, 28 Ohio St., 568–580).

"Courts in some cases have, notwithstanding great delay, inquired into the equities between the parties, and, where it is apparent that justice could be done, have given relief" (Am. Cyl. and tit. Laches, p. 541).

"When the delay has worked a wrong to the adverse party, who has thereby been induced to do something, or to abstain from doing something, the plaintiff is usually deemed to have precluded himself from relief, and it has been held that *so long as the relative position of the parties is not altered* to the *defendant's prejudice*, delay is of very little consequence" (Am. Cyl. L., tit. Laches, p. 454, citing Nadd *vs.* Powers, 136 Mass., 273; Daggers *vs.* Van Dyke, 37 N. J. Eq., 130; Platt *vs.* Platt, 58 N. Y. 646; Wollaston *vs.* Tribe, L. R., 9 Eq., 44–50; *Ex parte* Adamson, L. R., 8 Ch. Div., 807–817; Ridgeway *vs.* Newstend, 3 De G., F. and J., 474–485; Linsay Petr. Co. *vs.* Hurd, L. R., 5 P. C., 221; King *vs.* Anderson, 1 R., 8 Eq., 625).

In Wollaston *vs.* Tribe, L. R., 9 Eq., 44–50, a bill was brought in 1868 to set aside a marriage settlement executed in 1858 on the ground of fraud and mistake. Lord Romilly, M. R., said:

"Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing with an altered state of matters, that might have raised a question, but there is nothing of that sort."

In *Ex parte* Adamson, James, L. J., 807, 817, said:

"Nobody ought to be estopped from averring the truth or asserting a just demand unless by his acts or words, or neglect his now averring the truth, or asserting the demand, would work some wrong to some other person who has been induced to do something or to abstain from doing something, by reason of what he has said or done."

"Where a delay of thirteen years had occurred but the evidence in support of the claim was *entirely documentary*, and there had been no *change* in the situation of the parties, it was held that mere lapse of time was no bar" (Cranmer *vs.* McSwords, 24 W. Va., 594, 601).

In Daggers *vs.* Van Dyke, 37 N. J. Eq., 130, which was a suit brought to reform a deed, the court said:

"The delay of the complainant in seeking redress constitutes no defense. It is only when the complainant has slept

over his wrongs so long that great and serious wrong will be done to the defendant, that laches constitutes a complete defense. Here the parties are in almost exactly the same position that they were in at the time the wrong for which redress is sought was done, and relief may be given to the complainant without doing any harm whatever to the defendant."

II.

THE DEFENDANTS MUST, OF COURSE, DENY THE CHARGE OF UNDUE INFLUENCE.

It is strenuously contended by the defendants' counsel that the denial by his clients of the charge of undue influence should have great weight with the court. This, we submit, is reasoning in a circle. The issue is undue influence or not. There would have been no such issue if the defendants had not denied the charge. But there is one thing which it will be difficult to deny with plausibility in view of the testimony of Julia Russell, one of the daughters and a recipient of one-half of this gift of $15,000 of bonds. Repeatedly she says, "I always resented any one saying my mother was in her *dotage*" (Rec., 106, 108, 109). This old lady, whose feebleness of mind was so impressed upon those who took interest enough in her to visit her that they felt impelled to speak of it to her daughters, is the woman whom we find placing in the laps of these two daughters, then living with her, $15,000 in United States bonds, in violation of the express language of the wills of herself and husband and of their constant course of conduct up to that time.

EXHIBITS NOS. 1 AND 5 OF DEFENDANTS' TESTIMONY.

Great reliance is placed by the defendants upon these papers. Both of them purport to be signed by Mrs. Mary I. Campbell. The first is not dated, and is said to have been written by Mrs. Campbell to explain away an alleged charge

that Julia Russell had influenced her father to bequeath her and her sister Christiana $5,000 each, when no such bequest had been made to their brother Leonidas. The will of Mr. Campbell sufficiently explains these two legacies. They were bequeathed to his daughters because of his having, as he states, during his lifetime made previous gifts to his son, and these two legacies were, as plainly as if he had said it in so many words, to *equalize* those gifts. That such was their purpose is shown by this paper, Exhibit No. 1, although rather clumsily expressed. Mrs. Campbell says in this undated paper:

"I desire to state that the charge which has been brought against my daughter Julia as having in any way, either directly or indirectly, used any influence connected with her father's will is false in every particular. Especially with regard to the legacy of $5,000 each to her and her sister. I wish to say that it was done at my suggestion, without the knowledge of either of them, I knowing as I did, that our son *had received considerably more than either of his sisters.* We did it in justice to them, and even this amount did not make them equal to him, as the books now show $6,897.62 more than they had received."

This paper was evidently written some years *before* Exhibit No. 5. *Who* gave to this old lady of 83 or thereabouts these figures, $6,897.62? Did she go to the books herself and figure it out? Or did Frederick L. Moore, her business agent and the husband of Christiana, tell her that "the books" showed that difference? It is a remarkable circumstance that the books *were not produced* upon the trial to show the correctness of these figures. We are asked by the defendants to believe, without a particle of evidence to support the assertion, that Mr. Campbell's "books" show that prior to the death of Mr. Campbell Leonidas had received, besides this $6,897.62, $5,000 more in gifts than each of his two sisters, and that this $10,000 was given to them to equalize in part the excess, and, moreover, that it took a

further gift to these two sisters of the $15,000 in bonds ($7,500 to each) to completely equalize it; for that is the inference to be drawn from Exhibit No. 5, which reads as follows:

"I have today voluntarily, without suggestion from any one given to my two daughters the 4½ and 4 per cent. United States bonds coming to me from the estate of my husband, amounting to $13,000 at par thus equaling their share with the amount received by their brother and his family.

"MARY I. CAMPBELL."

Passing for the moment some peculiarities in the origin of this paper, and confining ourselves to the immediate point before us, let us look at the facts:

In 1868 William Campbell turned over his business to his son Leonidas. As this was a gift of considerable value, he about the same time gave to each of his two daughters a piece of real estate (to one a house and the other a farm), and, as he did not consider that this real estate was as valuable as the business turned over to his son, he made that son execute to each of his sisters certain promissory notes to *equalize* them with him. In 1868, therefore, Mr. Campbell considered that he had placed his three children on an equal footing as to advances. Ten years later (March, 1878), as we have seen, he made his will, in which he provided a legacy of $5,000 each for his two daughters. The whole tenor of this will shows (although he did not express it in as definite and express words as he might have done) that he regarded these legacies as putting his daughters upon an equality in respect of any additional provisions he had made for his son since 1868. We have seen also that Frederick L. Moore himself thought the will was a fair one, and that on the day the will was read at the family gathering he was careful to impress that opinion to Mrs. Mary K. Campbell (the mother of complainants) and to inform her that will would be carried

out "to the very letter." But, what is more important, the widow and mother, Mrs. Mary I. Campbell, thought it was a "just" will. She said that she and her husband, in regard to its provisions, "had tried to do what was right" (Rec., 47); yet, if the statement contained in this Exhibit No. 5 is correct, it was not a "just" will, and he did not do what was "right" according to Mrs. Campbell's notions, for, in order to put her daughters on a supposed equality with her son in regard to benefits, she says she gave them this $7,500 each.

Undoubtedly, by requiring his son in 1868 to execute notes to his two daughters for the difference in value between the real estate given them and the business turned over to the son, Mr. Campbell and Leonidas and Mrs. Campbell and the two daughters, we may assume, all considered that at that date equality of benefits had been provided for; yet, according to this paper, in the ten years which had elapsed since 1868 he had given Leonidas $11,687 more than h had given to each of his daughters and had only provided $5,000 apiece for them by his will instead of at least $10,000 apiece, as he could and would have done had he treated them in his lifetime with any such inequality. Undoubtedly, if "the books" had shown such an inequality of affairs, the defendants, in whose possession they were, would have been only too glad to have produced them in order to support the statement made in these two exhibits. The only certain inference to be drawn from their non-production is that they would not have shown anything of the kind, and that Mrs. Mary I. Campbell was either depending upon untrue statements made to her and not upon any books that she had seen, or that the books had been "doctored" to mislead her. The defendants' whole case is based by them upon the truth of this statement that there was not equality by about $15,000 at the time of the making of Mr. Campbell's will, or, if they will have it so, at the time of his death, and *that the books show it*," and yet they make no attempt to show it" by the books, or even, as we have seen, to *produce*

the books. How is this to be explained away except as we have stated? Or it may be *there were never any books* to produce, which is most probably the true explanation. If so, where did this old lady, who her visitors thought to be in her dotage, get the idea that "the books showed" any such figures? Did she mean Frederick L. Moore's books? If so, where did *he* get his figures and why is the matter left in the dark? These are very serious questions, and we submit that in the face of the strong *prima facie* case of the plaintiffs they ought to have been answered.

EXHIBIT NO. 5 BETRAYS WHAT IT WAS DESIGNED TO CONCEAL.

The paper or letter purporting to be signed by Mrs. Mary I. Campbell about the date of this alleged gift and in which she formally asserts that the gift was made "freely, voluntarily," &c., presents a feature in the case strikingly similar to that in Taylor *vs.* Taylor, 8 Howard, 183, in which the donor (a young daughter) had written a letter to her father declaring that her act (in executing a certain deed) was "unbiased by any control whatsoever," and that she was acting of her own free will, dictated by her feelings alone, and unknown to any person, &c., &c.

As in the case at bar, much reliance was placed upon this letter as establishing out of the mouth of the donor herself the free and voluntary character of the gift. The only difference in the two cases, it will be observed, is that the donor in the case cited was a young lady of 23 years of age, and in the case at bar an old lady of 83; both of them, however, were in a sense *in vinculis*—*i. e.*, the beneficiary being the adviser and caretaker of the donor. Let us note the criticism of Mr. Justice Daniel, speaking for the court, in regard to this "overmuch protestation" of the donor, and see whether a similar criticism will not apply to this singular paper purporting to have been signed by Mrs. Campbell. Says the learned justice:

"It seems impossible to resist the evidence furnished by this singular production, that it was a fabrication, *designed to conceal the very facts and circumstances which it palpably betrays.* In the first place, it may be inquired why such a letter should be written, and whether it would be usual or probable in a transaction between persons thus situated [father and child] if dictated solely by an admitted sense of propriety and sanctioned by a willingness of both the parties to it. Can we accredit the probability of a formal diplomatic communication from a daughter just grown, to her father, residing under the same roof, to justify an act which they both believed it a sacred duty to perform? Again let us look at the declaration here so anxiously and pompously paraded, that, in the act about to be performed by this daughter she 'was unbiased by any control whatsoever; and that, in the *liberty* she was then using, she was acting *by her own free will, dictated by her feelings alone, and unknown to any person,*' and we shall perceive an apprehension, or consciousness of suspicions, which it was believed the simple transaction itself would neither prevent nor allay. Here are the very *clausulæ inconsuetæ* pointed to in Twyne's case, as the sure badges of that which they are intended to hide. Why should this young woman have taken such deliberate pains to declare, and to place as it were on record, a history of her motives, her entire exemption from persuasion, authority, or even advice, in what she was about to do in obedience to affection and a sense of duty? If these had constituted the real incentive to her act, would they have left room for one thought or surmise of dishonor, connected with the objects of that affection and duty? Such suspicions and surmises are rather the offspring of colder calculation, and of the 'compunctious visitings' that wait on contemplated wrong. * * * The tone, the language, the artificial structure of this letter, its familiarity with the terms peculiar to the business of life, all bespeak it, in our judgment, not the production of an inexperienced girl, but of a far more practical and deliberate author. Lastly may be mentioned, with respect to this letter, the care with which it has been preserved, and placed beyond the control of this daughter, *as a prop to a transaction which could not stand alone, and as a means of stilling the murmurings of future complaint;* the very ends for which it at last emerges from its secret recess."

We submit to the court that every word and every point of this criticism applies with equal force to this paper alleged to have been prepared by Mrs. Campbell. So formal a business paper as this, prepared in the technical language of one familiar with legal papers, could not in the nature of things have originated with this simple minded old lady. Frederick L. Moore, the husband of one of the donees, and himself the business agent and adviser of Mrs. Campbell, and at whose house she was living, could have dictated such a paper, and it was to his interest that "a transaction which could not stand alone" should have a "prop" of this sort. If this paper was not the production of his "compunctious visitings," then, in seeking for the *raison d'etre* of this singular document, we must ignore entirely the *interest* which a party may have in its procuration and preservation.

But it is said (Rec., 123) that it was suggested to Mrs. Campbell that she should sign such a paper, because it was feared that some attack might be made by the children of Leonidas upon this disposition of the bonds. This is itself a confession that the gift was a *questionable* transaction and required something in the way of a shield to defend it; but it cannot fail to occur to the simplest minded why it was, if everything was open and above board in the transaction, that the widow and children of Leonidas were kept in ignorance of a matter which concerned them so greatly. Was it because the donees were afraid that these children would convince this old lady of the injustice of her conduct and lead her to remedy the wrong by making for her grandchildren an equal provision? We submit that the defendants have not answered and cannot answer these questions to the satisfaction of the fair-minded.

MRS. BAKER'S EVIDENCE.

Feeling that it is vital to his case to do so, a strong effort is made by defendants' counsel to impeach the important testimony of Mrs. Laura Baker. Plaintiffs' counsel frankly concede that Mrs. Baker was a nervous and inexperienced witness. She was undoubtedly upon the witness stand for the first time in her life, and exhibited the usual "stage fright," if we may call it so, of female witnesses when called upon to testify for the first time. We should not forget, therefore, to make allowance for this in considering her testimony, and should look rather for substance than detail. The salient and important fact in her testimony is that she had *two* conversations with Mrs. Mary I. Campbell, in which Mrs. Campbell stated to her that she had been *worried* into giving this money to her two daughters. If this be true, then the *exact* time when the conversations occurred is unimportant. No witness, however nervous she may be in relating details, would attempt to testify as to *two* conversations, neither of which occurred in point of fact, unless she is *willfully* falsifying, and there is nothing in Mrs. Baker's testimony, or elsewhere in this case, to justify such an imputation in regard to this old lady. Nevertheless, the defense, by the very exigency of their case, are obliged to make this imputation and to seek to sustain it by adroit argument. Let us, therefore, examine Mrs. Baker's testimony a little more closely than would otherwise be necessary. She testified to two conversations with Mrs. Campbell, one of which occurred *before* the death of Eloise and the other shortly *afterwards*. She says it took place when Mrs. Campbell was living at Mrs. Moore's house in a room under the mansard roof. It is conceded that when Mrs. Campbell lived with her daughter, Mrs. Moore, she occupied a room *under the mansard roof*. So that the *place* is identified. It is also conceded that she lived there

until about a period between ten and fifteen days after Eloise's death, when she went to live for a time with her granddaughter, Mrs. Tinney. If, then, the last conversation in question occurred at all it must have been had during this period of ten or fifteen days. Now, Mrs. Baker distinctly reiterates, and emphasizes it throughout her testimony, that she will not be bound by dates, even the dates of the death of friends, but she is equally as emphatic in saying that *whenever* this last conversation occurred, it was held in the room *under the mansard roof* (Rec., 45). She gives it as her best recollection, however, that it occurred "about a month or six weeks after Miss Eloise's death." She was testifying in November, 1896. Miss Eloise died in October, 1885, so that the witness was endeavoring to fix as near as possible the exact time of a conversation which took place about *eleven* years anterior to the time when she was testifying, and she missed it only by about *two weeks or a month*—a trifling error, it certainly must be conceded by everybody; and yet it is because of this comparatively insignificant error as to time committed by a witness who disclaims the ability to give the exact date that the court below would throw out Mrs. Baker's testimony entirely!

But the defendants' counsel claims that he does not rest his charge of falsity (to express it by no stronger word) solely upon the inexactness of the witness as to a date. He insists further that Mrs. Baker testified that at the time of these conversations she was *alone*, whereas the plaintiffs themselves contradict this by placing upon the stand Mrs. Baker's daughter Eliza, who testifies that she was with her mother on both occasions and heard the statement of Mrs. Campbell. Let us therefore look into this serious charge. It is based upon a solitary question put the witness on cross-examination and her answer thereto, the question and answer being as follows:

"Q. Was this [conversation] in the presence of Mr. and Mrs. Moore?

"A. No, sir. I was alone."

Observe, the witness had been catechised for some time when she suddenly has her attention directed to the members of the Moore family by the question, "Was this in the presence of Mr. and Mrs. Moore?" She is not asked "Was this in the presence of your daughter Eliza?" She naturally assumes that her questioner desires to be informed whether any member of the Moore family was present, and apparently with reference to that matter only replies, "No, sir; I was alone," meaning thereby that none of the family was present. It was not a recent occurrence, and unless her mind had been directed pointedly to the fact, it was quite likely that she either overlooked, for the moment, the presence of her daughter, or did not regard the question as referring to her, who at that time was quite young. Yet it is easily conceivable that Mrs. Baker regarded the presence of her child as not incompatible with the statement that she was alone in respect of this conversation with Mrs. Campbell. A mother is asked whether certain adult persons of advanced years (the Moores were then considerably over fifty years of age) were present at a certain conversation. Knowing that they were not present and with her thought diverted to them, she makes no note of her young child, and replies, as she conceives correctly, "No; I was alone." Is not this a rather slender string upon which to hang so heavy a charge as perjury against a mother and her daughter? In point of fact, Mrs. Baker's statement would have been technically inaccurate even had her daughter not been present. She would not even then have been *alone*, for Mrs. Campbell was present, since it takes two to make a conversation. This illustration only shows that witnesses are not "armor clad" against the fine thrusts of ingenious counsel seeking to break down their testimony. For this reason the rules of evidence provide that the witness's *attention* shall be first drawn directly to any matter about which it is proposed to contradict him, in order to afford him an opportunity to affirm or deny intel-

ligently, and with full knowledge of the purport of the question. Had Mrs. Baker been asked, therefore, the direct question whether her daughter was present or not, and she had answered "No; my daughter was not present," the contention of the learned counsel for the defendants would not be as groundless as it now is.

But even if we strike out Mrs. Laura Baker's evidence altogether, that does not help the defendants, for there is still left the testimony of Miss Eliza Baker, who swears *she also* heard the conversation, and states with more detail than her mother just what Mrs. Campbell said. So here are two witnesses without the slightest conceivable *motive* for deliberately perjuring themselves, whose testimony we are arbitrarily asked to entirely disregard as a lie, pure and simple, made "out of whole cloth," for that is the sum total of it. The matter cannot be minced.

We have dwelt more at length upon these two matters than we otherwise would have done had the Court of Appeals not adopted the theory of the defence as to Mrs. Baker's testimony. (No reason was given for rejecting the daughter's evidence.) A course which naturally led to the dismissal of the bill.

Therefore the order and decree of the Court of Appeals in sustaining the judgment of dismissal of the bill by the supreme court of the District should be reversed, and we ask it to be.

Respectfully,

FRANKLIN H. MACKEY,
A. H. GARLAND, and
R. C. GARLAND,
Attorneys for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 198.

BLANCHE K. TOWSON ET AL., APPELLANTS,

vs.

CHRISTIANA V. MOORE ET AL.

Supplemental Brief for Appellants on the Question of Jurisdiction, etc.

The appellees, on page 6 of their brief, raise the point for the first time that the amount in controversy in this case is not over $5,000. They figure the amount at $4,285.71, and they do this by taking into the account the value of the bonds alone. They were United States registered bonds, drawing, some of them, four and others four-and-a-half per cent. interest (Ex. 5, Rec., p. 134). How much of each does not exactly appear from the record, but it is immaterial, and we shall consider that all of them drew the lower rate. These bonds came into the hands of the alleged donees October 5, 1885. The bill was filed April 16, 1896, an interval of a little over ten years and six

months. During all this period the alleged donees have received from the United States on account of these bonds interest checks amounting to $5,460, which, added to the principal sum, aggregates $18,460. It is conceded that appellants' share of the estate is six-sevenths of one-third. If, therefore, we are entitled to share in these bonds and the interest checks collected by the alleged donees on account of them, our share would be $5,238, even if all the bonds were only 4 per cent. bonds.

But it is said we are not entitled to compute interest. It might be conceded by us that we are not entitled to compute interest *qua* interest, because we do not claim it; but it is quite a different thing from charging a party with *interest* on money wrongfully detained by him, which he would be liable for whether he received it or not, and charging him with *money* actually received by him on account of certain bonds which he wrongfully claimed to own. If these bonds had been retained by Mrs. Campbell, these interest checks would also have been received by her, and would have gone to *increase* the amount of her estate and our consequent share in it by $18,460. This would be still plainer if they had been coupon bonds, and for the purposes of the case it would be immaterial whether they were the one or the other. Let us suppose, then, for a moment that they were coupon bonds, and that the alleged donees had them today with none of the coupons detached, would it be said that if the court declared us entitled to a share in them the appellees would be first entitled to clip off and appropriate these coupons, aggregating $5,460? We apprehend not. Nor would it make any change in our rights if they had already clipped them and turned them into money as they became due. These interest checks, therefore, which were collected by the appellees from time to time and turned into money bore the same relation to the bonds that coupons would have borne. In point of law they are to be regarded as one and the same

thing. The interest checks and the bonds are *together* the *thing* in controversy.

The case in 17th Howard cited by the appellees is not, therefore, in point. The court in that case had referred to interest upon a money demand where the interest is a *penalty* adjudged in the nature of *damages* for the wrongful detention of the money, and being a penalty must be *claimed* before it can be awarded. We might, it is true, have claimed interest upon the money received from these checks from the respective dates of their reception by the appellees, Christiana V. Moore and Julia Russell; but we did not claim it, and it may be that we are not entitled to compute that in the calculation of the amount in controversy; but these interest checks we did claim when we claimed the bonds, for they are a part of the bonds—as much so as would have been the coupons, had they been coupon bonds.

Moreover, while it is true, as a rule, that executors and administrators, or other persons holding advancements for heirs, are not chargeable with interest upon them until the proper time of settlement of the estate has arrived and there is a failure to turn over those advancements, yet when it is shown the party holding those advancements has converted them to his own use, or they have been used by others with the knowledge and acquiescence of the party holding them, then these parties are chargeable with their value and the interest upon them from the time of the conversion: and they are liable in an accounting for the amount they have so received, with interest. That is this case. These bonds were transferred on the 5th day of October, 1885, to Mrs. Moore and Mrs. Russell, and they were worth so much, and now we ask what they have received as interest or what not in this transaction. This is equity, and it is law, and appellants, if their claim is otherwise good, are entitled to this, which will place the amount far beyond the jurisdictional sum mentioned in the statute, as the interest is 6 per cent. and, running from the time of the conversion

of these bonds till the decree in the court below, makes the amount, even in interest, not less than $3,000; and this interest is of right in equity, whether it is specifically claimed in the complaint or not; for, as Lord Coke says, "what is money but the use of it."

The calculation of appellees' counsel, that there is only six-sevenths of a third of the value of these bonds in issue, will not do, if even these bonds were the only matter in demand. There are two infant Fry children. They are entitled to the other one-seventh of a third. They are not complainants, certainly, but then their interest appears clearly on the record; and as they are minors, they will be protected by the court as well as if they were complainants; and when the court orders this accounting asked for herein, they will be awarded their share as if they had been complainants in proper and due form. In a court of equity all interests are looked after and deemed as between the parties, regardless of the fact, technical, whether one or more is complainant or defendant, and if a party having an interest will not be a complainant, he can be made defendant and the suit proceed as well. These are minors, and no one appears for them as guardian or otherwise, but the court will act as their guardian and see they get what is due them, just as if they appeared as complainants in due and legal form, and this of itself overthrows completely the fine-spun calculation that only $4,285.71 are in controversy in this suit.

But even if we are wrong as to all the foregoing views as to the amount in controversy, that does not end the matter. The record shows that the appellants are entitled to *other property* to which, by the dismissal of the bill, they are forever estopped from enforcing their claim.

The sixteenth paragraph of the bill alleges:

"That the estate of the said Mary I. Campbell has not been finally settled; that there remains to be sold by the said executors and trustees very valuable real estate known

as 610 E street northwest, devised to them [the executors] *to be sold* and the proceeds of such sale to be equally divided between the said Julia and Christiana and the said children of Leonidas" (Rec., p. 5).

and then it is prayed:

"That the real estate devised by the said Mary I. Campbell not yet sold *may be ordered to be sold*" (Rec., p. 5).

Following this there is a prayer looking to the accounting for the proceeds.

The sixteenth paragraph of the answer *admits* this sixteenth paragraph of the bill, viz., that the real estate *has not been sold*, &c. Now, then, since this real estate was devised to be sold and the proceeds divided, as was the duty of these executors and trustees to have done, what remedy have these appellants except to *compel* the sale and division thereof through the processes of the court by the filing of this bill If the bill be dismissed, the appellees *may retain this real estate forever*, for the dismissal of the bill is an adjudication that they had either already sold and divided it, notwithstanding their admission that they had not done so, or it is an adjudication that they are not required to sell and distribute the proceeds. This dismissal of the bill, therefore, was a practical denial to the appellants of their interest in the real estate not sold, and it must be conceded that appellants' interest therein, taken with the value of the bonds, far exceeds the amount necessary to give jurisdiction, viz., over $5,000; and this property, by stipulation filed in this case, was worth at the time the bill herein was dismissed at least $10,000, and that stipulation is appended hereto.

Also, on page 120 of the record, Fred'k L. Moore, one of the executors and defendants, estimates the value of this real estate to be fifteen thousand dollars.

FRANKLIN H. MACKEY,
A. H. GARLAND,
R. C. GARLAND,
Solicitors for Appellants.

COPY OF STIPULATION.

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective solicitors, that the real estate described in the bill as No. 610 E street northwest is and was at the time of the dismissal of said bill worth at least ten thousand dollars ($10,000)."

CHAS. H. CRAGIN,
Solicitor for Appellees Moores and Russells.

FRANKLIN H. MACKEY,
Solicitor for Appellants.